SC No. 88581

IN THE SUPREME COURT
OF MISSOURI

RANDOLPH AND KELLY AKERS,

Respondents/Plaintiffs,

v.

CITY OF OAK GROVE, MISSOURI,

Appellant/Defendant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
The Honorable W. Stephen Nixon
No. 02CV233809

SUBSTITUTE RESPONDENTS' BRIEF

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STATEMENT OF FACTS

As Respondents are dissatisfied with the completeness and fairness of Appellant's Statement of Facts, Respondents submit the following Jurisdictional Statement, pursuant to Missouri Supreme Court Rule 84.04(f):

Plaintiffs/Respondents Randolph and Kelly Akers are husband and wife, and they reside in Oak Grove, Missouri. (Tr. 462) They owned the property at issue, two apartment buildings in Oak Grove, since the early 1990s. (Tr. 463-66) Mr. Akers has been in real estate rental and management for 20 years. (Tr. 463) The apartment buildings are known as the Harding Street Apartments, and they are located at 1902 and 2002 Harding, Oak Grove, Missouri. (Tr. 463-66) At the time of the purchase, the apartment complex consisted of the two four-plex apartment buildings located at 1902 and 2002 Harding. (Tr. 466) Some time after the purchase, Respondents built two new six-plexes at the complex. (Tr. 467) The two original four-plex buildings are the subject of this action.

On May 8, 2002, sewage from the City's sewer system backed up into Respondents' apartments at 1902 and 2002 Harding Street. Sewage gushed out of a toilet, and also came out of the bathtub, of an apartment located in 2002 Harding Street, whose tenants were Daniel Smith and his family. (Tr. 60-61, 65, 77-78, 103) Sewage came out of a toilet, bathtub and sink of an apartment located in 1902 Harding Street, whose tenants were Juan Valencia and his family. (Tr. 86) A great deal of sewage entered the buildings; there was testimony that the sewage was one foot or more in depth in both apartments. (Tr. 68-69, 92) While the testimony varied as to the amount of damages, the evidence presented by both

parties established the Harding Street Apartments sustained a significant amount of damage. (Tr. 295, 602)

On May 9, 2002, the day after the back-up, Mr. Akers went to city hall and notified Wanda Rinebow, a City employee, and Charles Nebgen, who at the time was a City employee, of the back-up. (Tr. 476) Mr. Akers made a formal claim to the City for his damages for the May 8, 2002 sewer back-up. (Tr. 476-77) The City sent an adjuster to Respondents' property the week of the back-up. (Tr. 477, 478-79, 481) The adjuster met with Mr. Akers and inspected the property. (Tr. 478-79) The adjuster offered to send a crew to the apartments to remove items from the apartments as quickly as possible, but Mr. Akers told the adjuster that he would obtain a dumpster and put a crew to work on the job. (Tr. 479) Mr. Akers did what the adjuster asked of him. (Tr. 479-81) The adjuster told Mr. Akers that the City would be getting back with Mr. Akers to remediate the property. (Tr. 479-80) Instead, the City denied Respondents' claim in November 2005, approximately six months after the adjuster visited Respondents' property. (Tr. 477, 481) Between the time of the adjuster's visit to the property and the City's denial of the claim, there was correspondence between Respondents' attorney and the City's attorney regarding the status of Respondents' claim. (Tr. 513, 567) Appellant's only offer before Judgment was $10,000.00, and Respondents' last demand before Judgment was $225,000.00 (L.F. 167)

Respondents' action was tried pursuant to their First Amended Petition (L.F. 4-9), and Appellant's Answer to First Amended Petition. (L.F. 10-14) Appellant moved to dismiss Count I - Negligence and Count II - Private Nuisance

of the First Amended Petition. (Tr. 12) The trial court dismissed Count II, and after initially denying the motion to dismiss with regard to Count I, granted the entire motion and dismissed Count I. (Tr. 12-13, 41-42) Count III – Inverse Condemnation was tried. Count III requested "Just compensation for the diminution of the value of Plaintiffs' real property …. and [j]ust compensation for any and all consequential damages resulting from the Defendant's taking of Plaintiffs' property, including but not limited to …. loss of use and enjoyment of Plaintiffs' property." (L.F. 8).

Before voir dire, Appellant and Respondents agreed that May 8, 2002 was the date of the condemnation or taking, assuming a taking occurred. (Tr. 43-44)

Counsel for Appellant and Respondents and the trial judge discussed the issue of pre-judgment interest in chambers. After the in chambers discussion and before voir dire, the following record was made:

> MR. HUNTER: Just one final matter, Your Honor, we might want to put on the record that I believe we discussed some in chambers yesterday was the issue of prejudgment interest.
>
> Plaintiffs do intend to request prejudgment interest. We believe it's just a legal matter for Your Honor to decide rather than an issue that needs to be presented to the jury.
>
> I believe – we understand defendant certainly contests that plaintiffs would be entitled to prejudgment interest, but I believe all parties are in agreement as a legal matter to be decided by the Court rather than an issue that needs to be submitted to the jury. I just wanted to put

that on the record so we don't have to spend any time on that during trial or submit an instruction or anything such as that if we are in agreement.

THE COURT: Mr. Majors, what is your position on that for the defendant?

MR. MAJORS: Obviously the city's position is that we don't believe they should be awarded prejudgment interest, but we do agree with the assertion that we believe it is a ruling for the Court and not a jury question.

We would be glad to have you rule on that should a taking be found.

THE COURT: The Court does acknowledge that there is case law that indicates that because this is a theory based upon constitutional law that the taking would occur as of the date of the events that caused damage and that the law requires compensation be made at the time of the taking and that interest is something that case law has recognized can be recovered.

The Court will view it as a mathematical calculation for the Court to make in the event that interest becomes appropriate.

MR. HUNTER: I don't believe there is anything further, Your Honor.

MR. MAJORS: Nothing further from the defendant.

THE COURT: All right. As soon as we get all the jurors up, then I'll come back in and we'll get started.

(Tr. 44-46)

The jury rendered a verdict on December 15, 2004 in favor of Respondents, assessing damages in the amount of $110,000.00. (L.F. 134-41) After the verdict was accepted, Respondents orally moved for prejudgment interest at the rate of nine percent from May 8, 2002 through the date of the verdict, Appellant opposed that request, and the trial court took the matter under advisement. (Tr. 821) The trial court issued its Entry of Judgment on Verdict on December 15, 2004. (L.F. 139-41) In addition to the damages of $110,000.00 that the jury assessed, the trial court awarded pre-judgment interest in the amount of $25,791.12 and costs of $2,321.07. (L.F. 140)

Appellant timely filed its Motion to Amend Judgment, (L.F. 142-48), and its Motion for a New Trial, (L.F. 149-58) on January 11, 2005 and January 14, 2005, respectively. The trial court denied Appellant's two after-trial motions on March 3, 2005. (L.F. 194-95, 198-99) Appellant timely filed its Notice of Appeal on March 14, 2005.

As set forth in Plaintiffs' Partial Satisfaction of Judgment, Respondent has paid the Judgment, except for pre-judgment interest and post-judgment interest on the pre-judgment interest. (Substitute Brief of Appellant, A-4 and A-5)

ARGUMENT

A. Standard of Review

To the extent that Appellant is seeking review of questions of law, they are within this Court's province of independent review and correction, and the standard of review is *de novo*. Barry Service Agency Co. v. Manning, 891 S.W.2d 882, 887 (Mo. App. W.D. 1995). To the extent that Appellant is seeking review of questions of fact, this Court should give deference to the trial court's factual determinations. Bradley v. Mullenix, 763 S.W.2d 272, 275 (Mo. App. E.D. 1988).

B. Appellant's Violation of Missouri Supreme Court Rule 83.08(b)

As permitted by Missouri Supreme Court Rule 83.08 (Appendix, A-2 to A-3), Appellant has filed a substitute brief. However, the content of Appellant's brief violates Rule 83.08(b), which reads in part "The substitute brief …. shall not alter the basis of any claim that was raised in the court of appeals brief[.]" The premise behind the rule is orderly litigation. State ex rel. Zobel v. Burrell, 167 S.W.3d 688, 691 n. 2 (Mo. banc 2005). While Appellant certainly did raise the issue of pre-judgment in the Court of Appeals, the basis of the claim of error has been significantly altered. Therefore, Respondents respectfully submit that large portions of Appellant's substitute brief should be stricken and disregarded. Linzenni v. Hoffman, 937 S.W.2d 723, 726-27 (Mo. banc 1997)(issues not raised in brief before the Court of Appeals were denied).

Respondents further respectfully submit that Appellant has abandoned much of its argument made to the Court of Appeals. Missouri Supreme Court Rule 83.08(b) states in part: "Any material included in the court of appeals brief

that is not included in the substitute brief is abandoned." Hence, that portion of Appellant's argument to the Court of Appeals which is not contained in the Substitute Brief of Appellant should be deemed abandoned. State v. Davidson, 982 S.W.2d 238, 243 n.2 (Mo. banc 1998)(points raised in brief filed with Court of Appeals but not contained in substitute brief are abandoned).

In the Court of Appeals, Appellant's Point Relied On II (Appellant's Amended Brief in the Court of Appeals, p. 12) read:

> The trial court erred in granting plaintiffs' request for prejudgment interest to the jury's verdict because landowners do not have such a right, as a matter of law, to prejudgment interest in an inverse condemnation case since (1) there is no constitutional, statutory or case law providing for the award of such interest; and (2) plaintiffs do not have a right to such interest in this case in that plaintiffs failed to comply with any statute, particularly Section 408.040.2, R.S.Mo. (2000), which would arguably support an award of such interest if sovereign immunity was disregarded and a proper statutory demand was made by plaintiffs, which they did not do.

In its Substitute Brief, Appellant's Point Relied On (Substitute Brief of Appellant, p. 7) reads:

> The trial court erred as a matter of law in adding prejudgment interest to the jury's award of damages in this inverse condemnation case because the "taking" constituting the inverse condemnation was a "temporary partial taking" with regard to which (1) interest could

not be mathematically computed by the court, as was done by the court, and (2) prejudgment interest, if any, that could have been assessed would have been a matter to be proved by plaintiff and included in the jury's damages award as part of its verdict, such that the award of prejudgment interest to plaintiff by the court was neither authorized as a matter of law, supported by the evidence, or the jury's verdict.

Clearly, Appellant has changed its Point Relied On. Furthermore, with one exception, the content of Appellant's argument has changed from its brief in the Court of Appeals to its Substitute Brief. In its brief to the Court of Appeals, Appellant claimed (1) there is no constitutional right to pre-judgment interest in an inverse condemnation case (Appellant's Amended Brief in the Court of Appeals, p. 25-26); (2) there is no statutory right to pre-judgment interest in an inverse condemnation case (Appellant's Amended Brief in the Court of Appeals, p. 26-28); (3) if § 408.040.2, RSMo. could be applied to permit pre-judgment interest in an inverse condemnation case, Respondents have not complied with that statute (Appellant's Amended Brief in the Court of Appeals, p. 28, 31-32); and (4) there is no case law that supports an award of pre-judgment interest in an inverse condemnation case (Appellant's Amended Brief in the Court of Appeals, p. 28-32). As Respondents understand Appellant's Substitute Brief, Appellant now argues (1) pre-judgment interest may be awarded to a landowner in an inverse condemnation case, but it should not be awarded to Respondents based upon the facts of this case (Substitute Brief of Appellant, p. 11-15); (2) if § 408.040.2,

RSMo. could be applied to permit pre-judgment interest in an inverse condemnation case, Respondents have not complied with that statute (Substitute Brief of Appellant, p. 13-14); (3) the jury's verdict precluded the trial court's award of pre-judgment interest (Substitute Brief of Appellant, p. 15-18); and (4) there is no substantial evidence to support the trial court's award of pre-judgment interest, and even if pre-judgment interest could be awarded, the amount of the trial court's award is excessive (Substitute Brief of Appellant, p. 18-20). Appellant's arguments to the Court of Appeals are not the same arguments that Appellant is making to this Court, except for Appellant's argument that Respondents have not complied with § 408.040.2.

The problems created by Appellant's attempt to raise arguments before this Court, that were not presented to the Court of Appeals, are compounded by the fact that Appellant has not been consistent with the positions it has taken throughout post-trial motions and appeal. In its Suggestions in Support of Its Motion to Amend Judgment, Appellant essentially raised four reasons why pre-judgment interest should not have awarded: (1) Respondents did not comply with § 408.040.2, RSMo.; (2) the trial court used the wrong interest rate, in that if interest were appropriate, the proper rate would be six percent rather than nine percent; (3) the issue of pre-judgment interest should have been submitted to the jury, rather than awarded by the trial judge; and (4) Respondents acted unreasonably and their demand was excessively high. (L.F. 142-48) Regarding the aforementioned four points, point (1) was presented to both the Court of Appeals and this Court. Appellant is attempting to present point (3) of the Motion

to Amend Judgment to this Court, but Appellant did not properly and timely present this issue to the Court of Appeals. Appellant has not presented points (2) or (4) of the Motion to Amend Judgment to either the Court of Appeals or this Court.

Appellant is not merely refining or expounding upon an argument already made to the Court of Appeals. Rather, Appellant has significantly altered the basis of its claim of error. Basically, Appellant has gone from arguing that no landowner is allowed pre-judgment interest in an inverse condemnation case, to arguing that landowners can be awarded pre-judgment interest in an inverse condemnation case but Respondents should not receive pre-judgment interest given the circumstances of this case. With all due respect to Appellant, Respondents submit the fact that Appellant has significantly changed its arguments reflects the weakness of Appellant's position.

Appellant's failure to comply with Missouri Supreme Court Rule 83.08(b) is not a mere "technical" violation. Rather, it imposes a significant burden upon Respondents, and more importantly, the courts. The purpose of Rule 83.08(b) is so appeals proceed in an orderly fashion. A party should not present one argument to the Court of Appeals, and then a new argument to the Supreme Court. Rather, the Court of Appeals should have been provided with the opportunity to consider the arguments that Appellant now is attempting to present to this Court. It is not efficient for the Court of Appeals to review a case and issue an opinion based upon one set of arguments, and then for this Court to review a case and issue an opinion based upon another set of arguments. Furthermore, it is burdensome,

time-consuming and expensive for Respondents to prepare a brief to file in the Court of Appeals to address the arguments Appellant made to the Court of Appeals, and to then prepare a brief to file with this Court addressing the new arguments that Appellant is trying to make to this Court.

Since Appellant has improperly attempted to raise new arguments and has abandoned all but one of its arguments to the Court of Appeals, Respondents respectfully submit there is only one question for this Court to decide. That question is whether Respondents were required to make a demand pursuant to § 408.040.2, RSMo., in order to recover pre-judgment interest. As will be discussed below, the answer to that question is no, because § 408.040.2 does not apply to an inverse condemnation case.

C. The Inapplicability of § 408.040.2, RSMo. to Respondents' Claim for Pre-Judgment Interest

Respondents agree with Appellant that Respondents did not make a settlement demand in accordance with § 408.040.2, RSMo. This does prevent Respondents from recovering pre-judgment interest, because § 408.040.2 simply does not apply to inverse condemnation cases. Respondents' right to pre-judgment interest was not based upon § 408.040.2, but rather upon the right to just compensation provided by the Missouri Constitution, as well as the United States Constitution.

The version of § 408.040.2 in effect at the time of trial and entry of judgment[1] (Appendix, A-4) read:

> **In tort actions**, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. **Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract**. (emphasis added by Respondents).

By its own terms, § 408.040.2 only applies to tort actions, and it does not limit a plaintiff's right to pre-judgment interest in non-tort actions. Plaintiff's tort claims were dismissed before trial, pursuant to Appellant's motion to dismiss. The claim that was tried was for inverse condemnation, a constitutional action not a tort action.

[1] Section 408.040, RSMo. was amended in 2005.

In its slip opinion, the Court of Appeals correctly held that § 408.040.2 does not apply to inverse condemnation actions, because they "have been removed 'from the realm of tort liability'." (Slip Opinion filed April 17, 2007, p. 7 n. 3, quoting Shade v. Mo. Highway & Transp. Comm'n, 69 S.W.3d 503, 510 (Mo. App. W.D. 2002)). Appellant's attempts to characterize inverse condemnation claims as tort claims are not well-taken. The case law is clear – inverse condemnation actions are not tort claims. *See* Randolph v. Missouri Highway and Transp. Comm'n, 224 S.W.3d 615, 617 (Mo. App. W.D. 2007); George Ward Builders, Inc. v. City of Lee's Summit, 157 S.W.3d 644, 650 (Mo. App. W.D. 2004); Thomas v. City of Kansas City, 92 S.W.3d 92, 100 (Mo. App. W.D. 2002).

As Respondents' inverse condemnation claim is not a tort claim, § 408.040.2 does not apply. Therefore, it is irrelevant and immaterial that Respondents did not make a demand in accordance with § 408.040.2.

Respondents did not need to make a demand in accordance § 408.040.2 in order to recover pre-judgment interest on their inverse condemnation claim. Therefore, this Court should affirm the Circuit Court and the Court of Appeals, and uphold the award of pre-judgment interest in the amount of $25,791.12. As the only issue properly before this Court is the issue of whether or not Respondents were required to comply with § 408.040.2 in order to recover pre-judgment interest, Respondents respectfully submit that this Court need read no farther. However, should the Court chose to review the rest of Appellant's alleged claims of error, the Court should find them to be without merit.

D. Constitutional Law – Pre-Judgment Interest

Inverse condemnation is an action based upon the United States Constitution and the Missouri Constitution which sets forth certain property owner rights. Article I, § 26 of the Missouri Constitution states "that private property shall not be taken or damaged for public use without just compensation."

Just compensation cannot occur absent the awarding of pre-judgment interest from the date of the taking until the payment is ordered to be made by the condemnor. The damage to Respondents' property occurred on May 8, 2002. This date was agreed upon by both parties at trial as the date in which the taking occurred. (Tr. 43-44) To prohibit the assessment of interest from the date of taking until the payment of the judgment would be to provide less than adequate compensation for the value of the property taken or damaged by the condemning party.

It has long been held by jurisdictions throughout our country that a plaintiff is generally entitled to interest in property cases. 11 S.C.Juris. Damages § 8 (a) (1992); *see* E.I. Du Pont De Nemours & Co. v. Lyles & Lang Constr. Co., 219 F.2d 328, 342 (4th Cir. 1955). The purpose of awarding interest is to compensate the landowner for the delay in monetary payment that occurred after the property has been taken. The addition of pre-judgment interest is designed to pay the landowner for the time value of money that should have been received at the time of the taking and is an element of just compensation. S.C. Dep't. of Transp. v. Faulkenberry, 337 S.C. 140, 149, 522 S.E.2d 822, 826 (Ct. App. 1999).

Unlike condemnation actions where interest is set by statute, the right to pre-judgment interest in inverse condemnation actions stems from the just

compensation clauses of the United States and State Constitutions. Vick v. S.C. Dep't. of Transp., 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). *See also* Danish Vennerforning and Old Peoples Home v. The State of Nebraska, 205 Neb. 839, 290 N.W.2d 791 (Neb. 1980)(Holding that interest is a matter of strict constitutional right and should run from the date of taking.)

In Sinatra, Inc. v. City of Seattle, 96 Wash. App. 757, 761, 980 P.2d 796 (Ct. App. 1999), the court addressed whether pre-judgment interest was appropriate within a condemnation setting. In doing so, the court stated that the constitutional mandate for payment of just compensation after private property is taken for public use requires that the property owner be put in the same position monetarily as the owner would have occupied had the property not been taken. The court held that just compensation included pre-judgment interest.

The court in Stewart v. City of Key West, 429 So.2d 784, 785 (Fl. Ct. App. 1983), stated the following:

> "The full compensation required by the Constitution in a direct condemnation action is equally required in an inverse condemnation proceeding, (citation omitted) and this constitutional requirement needs no enabling legislation to be effective. … It is undisputed that Stewart did not have the benefit of his land from the date of taking, nor did he have any compensation until final judgment was entered. In order for Stewart to be made whole, prejudgment interest from the date of taking must be allowed."

Our neighbors to the West have decided this issue. The Supreme Court of Kansas held that just compensation required allowance of interest from the date of taking until payment was made. In Herman v. City of Wichita, 228 Kan. 63, 612 P.2d 588 (Kan. 1980), the court stated:

> "The rule followed in Kansas is the rule generally followed throughout the United States. We have no hesitancy in following the Kansas cases and in holding that, in an inverse condemnation case, just compensation requires an allowance of interest from the date of the taking by the governmental body until payment is made where there is a lapse of time from the date of taking until the time of payment. The District Court properly allowed interest on the damages awarded prior to the entry of judgment in this case." Id. at 67.

Furthermore, In City of Cottleville v. American Topsoil, Inc., 998 S.W.2d 114 (Mo. App. E.D. 1999), the Court of Appeals addressed a trial court's denial of interest in an eminent domain case. Given the facts of the case, the Court of Appeals held that the trial court did not abuse its discretion in refusing to award interest to the landowner. However, the court, citing to St. Louis Housing Authority v. Magafas, 324 S.W.2d 697, 699 (Mo. 1959), did state "Interest from the date of taking was and is considered part of the just compensation required by Article I, Section 26 of the Missouri Constitution." City of Cottleville, 998 S.W.2d at 119-20.

Appellant cites to Byrom v. Little Blue Valley Sewer District, et al., 16 S.W.3d 573 (Mo. banc 2000), for the proposition that pre-judgment interest is dependent on the individual case and likely not appropriate where there is both an ill-defined partial and temporary taking. (Substitute Brief of Appellant, p. 13) Byrom does not support such a proposition. Byrom makes no mention of pre-judgment interest whatsoever, and it is not pertinent to the issues to be decided by this Court in this case.

E. Statutory Law – Pre-Judgment Interest

Civil action interest awards did not exist at common law and are purely statutory creations. The policy behind civil action interest awards differs from that of eminent domain and inverse condemnation. Civil action interest awards are generally in place to encourage the early settlement of claims, and not to merely add interest to the award. Civil action interest awards also serve the purpose of compensating a plaintiff for delay in obtaining a judgment.

In its Substitute Brief, Appellant discusses Catron v. Columbia Mut. Ins. Co., 723 S.W.2d 5 (Mo. banc 1987), and Fohn v. Title Ins. Corp. of St. Louis, 529 S.W.2d 1 (Mo. banc 1975). Both cases were actions for breach of insurance policies, not actions for inverse condemnation, so Respondents question their applicability to the case at bar. Nonetheless, Catron, the more recent of the two cases, supports the premise that the value of a plaintiff's damages does not have to be known with certainty in order for a defendant to be liable for pre-judgment interest. Here, while Appellant and Respondents did not agree to the amount of the damages, Appellant had knowledge of the nature and degree of Respondents'

loss within days of the taking, yet before trial Appellant never offered the amount of damages reflected by its own adjuster's estimate.

The Respondents were seeking an award based upon just compensation. Just compensation interest awards need not be created by statute. Just compensation interest awards are both a part of the condemnation award itself and represent part of the just compensation to which a condemnee is constitutionally entitled, arising out of the delay which takes place between the taking of the property and ascertainment of the award. Therefore, just compensation interest awards are not a creation of legislature, but a constitutional guarantee. Woodland Manor, III Associates, L.P. v. Reisma, 2003 W.L. 1224248 (R.I. Super. 2003) at 19.

Specifically, one case cited by Appellant in its brief supports the contention by Respondents that statutory authority is not required to award pre-judgment interest in a condemnation case. In St. Louis Housing Authority v. Magafas, 324 S.W.2d at 699, the court held:

> According to the weight of authority, the owner is in such circumstances entitled to interest, or, what is similar, to damages in the nature of interest for delay in payment. The right to such interest damages is not dependent on statutory provision or a special agreement.

Furthermore, Missouri statutes allowing prejudgment interest in eminent domain cases support the award of pre-judgment interest. While eminent domain and inverse condemnation are distinct actions, there are substantial similarities to

the principles governing each action. Principles determining the proper measure of just compensation regularly applied in formal condemnation proceedings, as set forth in Missouri statutes, certainly provide guidance to the courts in awards for compensation for a taking under inverse condemnation actions. The Missouri legislature has determined that prejudgment interest should be awarded in formal condemnation claim under the eminent domain statutes. Obviously, this determination suggests that just compensation for the property owner cannot occur unless the condemnee receives prejudgment interest to the extent that the jury verdict exceeds the amount of the commissioner's award. Section 523.045, RSMo. states in part:

> "If, within 30 days after the filing of any condemnation commissioner's report under the provision of Section 523.040, the condemnor shall have neither paid the amount of the commissioner's award to the persons named in the petition as owning or claiming any property or rights or to the clerk of the court for such named persons nor timely filed its written election to abandon the proposed appropriation of said property or rights, then interest on the amount of any subsequent verdict for said named persons, or if there be no such verdict, then on the amount of the award, at the rate of 6% per annum from the date of filing the report shall be added to said verdict or award and paid to said named person or to the clerk for them."

The rationale behind this law is simple. The condemnee should not be disadvantaged by receiving less compensation for his property than the jury verdict award. The time value of money is included in such a calculation requiring interest to be added to any verdict entered. The principles certainly apply within the context of inverse condemnation. A jury has determined that the Appellant has taken property from the Respondents. This taking occurred on May 8, 2002. While § 523.045, RSMo. does not directly apply because this is not an eminent domain case, the principles laid down by the Missouri legislature in § 523.045 suggest that just compensation requires the addition of pre-judgment interest in our present case.

F. The Jury's Verdict Did Not Preclude the Trial Court from Awarding Respondents Pre-Judgment Interest.

The parties clearly and unequivocally agreed that the trial judge, as opposed to the jury, would decide whether or not to award pre-judgment interest. This issue was discussed in chambers, and then a record of the stipulation was made in open court before voir dire and the introduction of evidence. There is no factual dispute regarding this issue – Appellant agrees that it entered into the agreement. However, in its Substitute Brief, Appellant claims that it should not be held to the stipulation because the evidence and the jury instructions were inconsistent with the stipulation. Appellant's contention is without merit. The stipulation was valid and enforceable, there was no mistake over the stipulation, and even if there were a mistake over the stipulation, which Respondents deny, Appellant failed to take timely action to address

the mistake and vacate the stipulation. Respondents respectfully submit that the stipulation must be enforced.

The parties were not stipulating to what the law is or to the scope and extent of damages the law provides. The parties were not agreeing that the trial judge could award Respondents a remedy that the jury could not award to Respondents. The parties were not expanding by stipulation the scope and nature of Respondents' damages and remedies. Rather, the stipulation decided who, the trial judge or the jury, would make the determination to award or not award pre-judgment interest. The stipulation made clear that pre-judgment interest was a contested issue and that Appellant disputed that pre-judgment interest should be awarded whatsoever, but the stipulation properly took the decision over awarding pre-judgment out of the hands of the jury and into the hands of the trial judge by agreement of the parties.

The agreement was a stipulation to procedure, not a stipulation to a question of law. Stipulations are "an agreement between counsel with respect to business before the court," and they are "controlling and conclusive, and courts are bound to enforce them." Pierson v. Allen, 409 S.W.2d 127, 130 (Mo. 1966); Zipper v. Health Midwest, 978 S.W.2d 398, 410 (Mo. App. W.D. 1998). This Court stated in Pierson that "Stipulations varying or altering trial procedure, or waiving the benefit of procedural statutes, have been consistently enforced by our courts in absence of any claim of fraud, duress or mistake . . ." 409 S.W.2d at 130. This is consistent with the long-standing principle that a criminal defendant can waive his constitutional right to a trial by jury and have his fate decided by a judge. If such defendant makes such waiver, he cannot later claim that he was

denied his right to trial by jury because of such waiver. In fact, a criminal defendant, who has numerous constitutional rights and protections that a defendant in a civil case does not have, is bound by his stipulation to admit evidence that would not be admissible but for the stipulation. State v. Ghan, 558 S.W.2d 304, 306-09 (Mo. App. S.D. 1977)(polygraph tests were admissible and criminal defendant waived objections to polygraph's admissibility due to his stipulation, even though the polygraph evidence would not have been admissible but for the stipulation).

Here, Appellant agreed that the trial judge, not the jury, would decide whether or not to award pre-judgment interest. This agreement made perfect sense, since the date of the taking (assuming there was a taking) was not in dispute and in fact was stipulated to by Appellant and Respondents. (Tr. 43-44). Further, there was consideration for the stipulation, as the stipulation relieved both Appellant and Respondents from spending time during trial arguing the issue of pre-judgment interest to the jury and preparing jury instructions on the issue, which permitted Appellant's counsel to concentrate on other matters such as liability and the amount of damages to Respondents' apartment buildings. In addition, the stipulation perhaps gave Appellant a tactical advantage by not having the fact that Respondents still had not been paid two and one-half years after their loss emphasized before the jury, which would have been the case if argument and jury instructions would have been presented to the jury concerning pre-judgment interest.

Assuming, for the sake of argument, that Appellant could have required the

issue of pre-judgment interest to have been submitted to the jury, Appellant waived any such right when it affirmatively agreed that the trial judge would decide whether or not to award pre-judgment interest. While Appellant may now wish that it had not entered into the stipulation and had instead insisted that the issue of pre-judgment interest be submitted to the jury, Appellant is bound by what it agreed to and the agreement should not be undone to the prejudice of Respondents. Had Appellant not entered into the stipulation, Respondents would have had the opportunity to have discussed pre-judgment interest during voir dire and opening statements, to have submitted a jury instruction permitting the jury to award pre-judgment interest, and to have requested pre-judgment interest from the jury during closing arguments. Appellant should not be relieved of a stipulation that it agreed to at trial more than two years ago.

In its Substitute Brief, Appellant claims the stipulation was based upon an understanding that proved to be inconsistent with the evidence and the jury instructions. This contention is without merit. The damages evidence presented at trial and the jury instructions were consistent with the allegations of and relief requested in the First Amended Petition. For example, the First Amended Petition requested damages for diminution of value and loss of use of Respondents' property, (L.F. 8), and Instruction No. 8 permitted the jury to award damages for diminution of value and loss of use (L.F. 114, Appendix to Substitute Brief of Appellant, A-6). Furthermore, Appellant did not object to Respondents presenting evidence of diminution of value and loss of use. (*See* Tr. 462-499) There was no misunderstanding over the stipulation. Rather, the evidence and jury instructions

were consistent with the allegations of the pleadings which existed at the time of the making of the stipulation.

Even if there were some subjective mistake or misunderstanding by Appellant regarding the stipulation, this is not a basis to relieve Appellant from the effects of the stipulation. While under some circumstances courts will relieve a party from a stipulation, "relief is never granted merely for the reason that the case has gone contrary to the expectation of the stipulator." State ex rel. Turri v. Keet, 626 S.W.2d 422, 425 (Mo. App. S.D. 1981)(quoting Keller v. Keklikian, 244 S.W.2d 1001 (Mo. 1951)). *See also* Lewis v. Vargas, 787 S.W.2d 319, 320 (Mo. App. W.D. 1990).

Assuming there were a mistake or a misunderstanding over the pre-judgment interest stipulation, which Respondents deny, Appellant has waived any complaint to the stipulation, because it failed to take timely action to raise the issue and vacate the stipulation. When a party believes the court has committed error or the party believes it has been otherwise prejudiced, the party has an affirmative duty to request timely relief. *See* St. John's Bank & Trust Company v. Intag, Inc., 938 S.W.2d 627, 629-30 (Mo. App. E.D. 1997)(failure to request mistrial until after jury retired to deliberate constituted abandonment of that remedy). If, after hearing the evidence presented at trial and reviewing Instruction No. 8 at the instruction conference, Appellant believed the basis for the stipulation no longer was good and the stipulation should not be enforced, then Appellant had an affirmative duty to bring this to the attention of the trial court and Respondents. This would have allowed the trial court to decide whether to enforce the

stipulation. If the decision were made to vacate the stipulation, then Respondents could have submitted a jury instruction permitting the jury to award pre-judgment interest, and Respondents could have asked for pre-judgment interest in closing arguments. Instead, Appellant waited until after trial and entry of an adverse Judgment, to claim that the issue of pre-judgment interest should have been submitted to the jury. Clearly, Appellant has waived and abandoned any basis for vacating the stipulation.

In its Substitute Brief, Appellant argues that Instruction No. 8 permitted the jury to award pre-judgment interest, therefore the jury might already have awarded it. Respondents first would note that this issue has not been preserved for review by this Court. Given the stipulation entered into by the parties, if Appellant believed that the jury instruction allowed the jury to award interest, then Appellant should have objected to the instruction on that basis during the instruction conference, as required by Missouri Supreme Court Rule 70.03. During the instruction conference, Appellant did raise any claim that Instruction No. 8 permitted the jury to award pre-judgment interest. (Tr. 762-65) Furthermore, if Appellant believed Instruction No. 8 to be improper, then Rule 70.03 required that the issue by raised in its post-trial motions. Appellant's Motion for a New Trial (L.F. 149-58) makes no mention of Instruction No. 8, and Appellant's Motion to Amend Judgment (L.F. 142-48) makes no mention of Instruction No. 8. Appellant's brief to the Court of Appeals makes no mention of Instruction No. 8. Therefore, Appellant cannot raise this issue for the first time before this Court.

Even if this Court could reach the merits of Appellant's argument

concerning the effect of Instruction No. 8, Appellant's contention fails. Appellant's claim is based upon speculation, and in fact it runs contrary to what occurred at trial and the jury instructions. Instruction No. 8 does not mention "interest" or "the time value of money." The jury never heard the word "interest" or the phrase "the time value of money" at any point during trial. The reason for this is that the parties had stipulated the trial court would address the issue of pre-judgment interest, so it was unnecessary, and arguably improper, for Respondents to address pre-judgment interest with the jury. During closing argument, Respondents requested that the jury award specific categories of damages, and pre-judgment interest was not mentioned. (Tr. 792-94) The Verdict made no mention of pre-judgment interest. (L.F. 131) Based upon the evidence, the jury instructions and the statements and arguments to the jury, there is no reasonable basis to conclude that the jury awarded Respondents pre-judgment interest.

In its Substitute Brief, Appellant claims that State ex rel. State Highway Commission v. Green, 305 S.W.2d 688 (Mo. 1957), and City of St. Louis v. Vasquez, 361 S.W.2d 847 (Mo. 1961), establish that the trial court erroneously awarded Respondents pre-judgment interest. Appellant's reliance upon Green and Vasquez is misplaced.

Respondents take issue with the conclusion that State ex rel. State Highway Commission v. Green requires pre-judgment interest to be submitted to the jury. This Court addressed this precise issue two years after the decision in Green. In St. Louis Housing Authority v. Magafas, the parties agreed to allow the court to make the pre-judgment interest determination, which is the same situation

presented in the case at bar. The issue of pre-judgment interest was submitted to the trial court and, because of the waiver by the interested parties, the Supreme Court held that the trial court had the power or jurisdiction to include an allowance for pre-judgment interest. In doing so, the court stated:

> "In the recent case of State ex rel. State Highway Commission v. Green, Mo. Sup., 305 S.W.2d 688, we gave consideration to the landowners' claim for interest upon the delayed payment but found it unnecessary to decide the question. In that case the claim for interest was not made until after the jury had returned its verdict fixing the amount of damages and the case was disposed of by a holding that, absent statutory authority, the trial court did not have the power to compute interest and add the amount thereof the sum fixed by the jury in its verdict and enter judgment for the total of the two sums. It will be noted that in the instant case the claim for interest was presented before trial and the court had the power or jurisdiction to include an allowance therefor in its finding and judgment. The question presented is whether the defendants may properly be allowed interest (or damages for delay in payment) under the circumstances existing herein." Id. at 699-700.

It is important to distinguish whether the award of pre-judgment interest is substantive or procedural. The method of calculation of pre-judgment interest is not substantive. In State ex rel. State Highway Commission v. Ellis, 382 S.W.2d 225 (Mo. App. 1964), the Court of Appeals analyzed § 523.045 RSMo., which is

the statute which allows pre-judgment interest in an eminent domain action. The court concluded § 523.045 was not substantive, but was procedural, given the fact that pre-judgment interest was a constitutional right that existed prior to the enactment of the statute. The statute merely eliminated the procedural difficulties relating to the imposition of the award. In State ex rel. State Highway Commission v. Kendrick, 383 S.W.2d 740 (Mo. 1964), the Missouri Supreme Court reached the same conclusion as the Ellis court; namely, that § 523.045 is procedural and did not give landowners new substantive rights.

The court in Ellis has rightly ruled that the way in which a trial judge or jury mathematically calculates interest has no bearing on the substantive issues tried in the court. Once the jury determines that a taking has occurred, it is this court's opinion that the landowner has a right to pre-judgment interest. Whether the jury or judge calculates that interest makes no difference. The parties in this case decided that the trial judge would make the determination whether or not to award pre-judgment interest, and to make the calculation if he decided to award prejudgment interest. In fact, there was no need for the jury to assess pre-judgment interest in the case at bar, because the date of the taking was undisputed and hence there was no decision to be made by the jury. If the jury believed a taking had been established, which they did according to their verdict, then pre-judgment interest would be constitutionally required and the jury would be instructed that they must add pre-judgment interest to the verdict. Therefore, the issue of pre-judgment interest simply becomes a matter of computation, which is a matter that the trial court is generally better able to handle than the jury.

This situation is analogous to the recent case of Walton Construction Company v. MGM Masonry, Inc., 199 S.W.3d 799 (Mo. App. W.D. 2006). In that case, MGM Masonry was given a jury verdict in the amount of $242,384.00 "plus interest". After the verdict was rendered, MGM Masonry asked the court to assess general interest and requested general prejudgment interest under §408.020. The court stated that, although the jury's verdict specifically stated that "MGM was entitled to damages 'plus interest'", the issue of interest was never submitted to the jury. The jury's view on the matter of interest is immaterial because the parties had agreed to submit those matters to the court." MGM Masonry, 199 S.W.3d at 808. This is analogous to the present case. Had the jury somehow added interest to the verdict, the trial court would have been bound by the stipulation and had to make the addition of interest on its own since the parties had clearly agreed that the court should be the one to add the pre-judgment interest. This court should make a finding consistent with that made in Walton Construction Company, and uphold this agreement made by the parties. This would not be inconsistent with the holding in Green and would actually support later decisions rendered by the Missouri Supreme Court.

There is no Missouri case or statute that specifies that a party in an inverse condemnation claim cannot agree to allow the trial court to assess prejudgment interest which has been requested *prior* to trial. In fact, the Magafas case provides authority for this exact agreement.

An examination of the specific holding in Green shows that the court never addressed a situation where a landowner's claim for interest was made *before* the

jury returned its verdict. In Green, the landowner's request for interest came *after* the jury had returned its verdict, fixing the amount of damages for the taking. At that stage, the Supreme Court held that the trial court did not have the power to compute interest and add that to the jury's verdict. This is clearly not the case in our present matter. The court in Green was not asked to address whether parties can choose to submit the issue of prejudgment interest to the trial court.

> "It should also be made clear at the outset that the trial court was not requested to give an instruction directing the jury to include in its verdict, interest from the date of appropriation upon any amount of damages found to be due defendant."
> Green, 325 S.W.2d at 692.

In Green, the jury was assessing damages relating to eminent domain. A genuine issue existed regarding whether interest would be allowed on the whole amount of damages or whether interest is allowed on the excess of the verdict over the commissioners' award. These issues do not exist in the instant case and, therefore, there was not a substantive issue for the jury to decide. Green does not prohibit this agreement of the parties in this inverse condemnation case.

Parties may stipulate to procedural functions that are outside of the strict statutory authority of the trial court. Missouri Supreme Court Rule 75.01 illustrates this principle. This rule and § 510.370, RSMo. establish that a trial court retains control over judgments only for a period of 30 days after entry of the judgment, if no post-trial motions are filed. Recognizing the lack of jurisdiction following the expiration of that 30 days, the Supreme Court created the following rule, in part:

> "… After the filing of notice of appeal and before the filing of the record on appeal in the appellate court, the trial court, after the expiration of such 30-day period, may still vacate, amend or modify its judgment upon stipulation of the parties accompanied by a withdrawal of the appeal."

This Supreme Court rule recognizes that a stipulation of the parties can create jurisdiction where the general statutory rule of law would not. By comparison, even if it is assumed that the trial court did not have jurisdiction to enter an award of interest, Rule 75.01 provides yet another example of how a stipulation between parties can create jurisdiction where it might not otherwise exist.

Neither the law nor common sense prevented the parties from stipulating that the issue of prejudgment interest not be submitted to the jury but instead be submitted to the trial judge for determination. The trial judge heard all the evidence presented at trial. He knew that the jury found that there was a taking, because the jury returned a verdict for Respondents, he knew the date of the taking because the parties stipulated to the date of the taking, May 8, 2002, and he knew that Respondents had not been paid. Therefore, the trial judge heard the necessary evidence and was in as good of, if not better, position to assess pre-judgment interest than the jury was.

Respondents believe that the discussion regarding pre-judgment interest in the City of St. Louis v. Vasquez case is not relevant to the present cause of action because the court in Vasquez attempted to add an additional sum of interest that

was not otherwise allowed by law. In other words, the court not only tried to add interest that was allowed by statute, but additional interest that was specifically not provided for by the statute. Therefore, the trial court has exceeded its appropriate jurisdiction. However, there is a quote from Vasquez that is important to the present cause of action. Vasquez quoted the Green case as follows:

> The judge can amend a verdict after the discharge of the jury as to 'matters of form or clerical errors clearly made manifest by the record, but never to matters of substance required to be passed on by the jury, which, in their nature, are essential to the determination of the case.' Green, 305 S.W.2d 694, quoting from Medford v. Lawson, 315 Mo. 1091, 287 S.W. 610 at 612.
>
> Vasquez, 344 S.W.2d at 848.

This is an important quote because of the fact that the determination of the assessment of pre-judgment interest would not had have been "essential to the determination of the case." Because pre-judgment interest is constitutionally required, so, once the date of taking is established, the jury would have had no choice but to assess the pre-judgment interest. Therefore, the assessment of pre-judgment interest was not "essential to determination of the case" and the parties' agreement to submit this matter to the judge was completely appropriate. In the Vasquez case, the Supreme Court concluded that the judge had no power to add a further allowance for an item of damage not submitted to the jury. This is completely different from what occurred in the present case. The Supreme Court's criticism of the trial judge's actions in Vasquez centered around the trial

court's attempt to add an element of damage not submitted to the jury and "not allowed by law". The assessment of pre-judgment interest in this case was allowed by law, and in fact Respondents submit that it was required by law since the jury found there was a taking.

G. There Was Substantial Evidence to Support the Award of Pre-Judgment Interest, and the Award Was Not Excessive.

In its Substitute Brief, Appellant indicates that the trial court calculated pre-judgment interest over too long of a period of time (Substitute Brief of Appellant, p. 10-11, 19-20), although Respondents are not certain what exact period of time Appellant claims the pre-judgment should have been confined to. Appellant's contention is without merit. Pre-judgment interest should run from the date of the taking to the date of the judgment. This is the only way to provide Respondents with full and just compensation.

There is no dispute when Respondents were damaged. The jury decided that the damage occurred to Respondents' property on May 8, 2002, and entered a verdict accordingly. Furthermore, while Appellant denied there was a taking, Defendant stipulated that if there were a taking, the taking occurred on May 8, 2002. (Tr. 43-44)

If the Appellant wished to avoid the payment of pre-judgment interest from the date of damage, it should have either a) provided Respondents a properly functioning sewer system which would not damage the Respondents' property; or b) paid Respondents' claim at the time of the taking. Because Appellant chose not to exercise either of these options, but instead forced Respondents to pursue time-

consuming and expensive litigation, pre-judgment interest is the only way to make the Respondents whole following the Appellant's unreasonable actions.

As best stated in St. Louis Housing Authority v. Magafas, 324 S.W.2d at 699:

> "In the great majority of the jurisdictions interest is allowed as part of the damages or compensation to which one whose property has been taken under the power of eminent domain is entitled as part of the just compensation required by the Constitution." Annotation, 96 A.L.R. 150. "Generally, in condemnation cases where there is a substantial lapse of time between actual taking of property and payment, interest on the damages for the taking of the property from the time of the taking until the time of final payment, or damages in the nature of interest for delay in payment of compensation, is properly allowed." Annotation, 36 A.L.R.2d 418

As one can see from Magafas, as well as the Missouri Constitution, it is the time of the taking that is of importance, not the date of the filing of a petition, the rendering of a verdict by the jury, the entering of the judgment by the trial judge, etc. According to trial testimony, the Appellant was on notice of the damages within twenty-four hours. Appellant's adjuster met with Mr. Akers and inspected the property within days of the sewer back-ups. Appellant was sent a letter from Respondents' attorneys only a couple months later demanding payment, which was denied. No offer for payment of Appellant's claim was made for well over a year after the damage occurred, and even then the offer was for only $10,000.00,

well under the jury verdict amount of $110,000.00. Now the Appellant should fully and fairly compensate the Respondents for all their damages, including pre-judgment interest on the verdict from the date the money was owed them, the date of the taking, which was the date of the sewer back-ups, May 8, 2002.

There is substantial evidence to support the trial court's award of pre-judgment interest, and the award was in no way excessive. The jury found there was a taking, and awarded damages of $110,000.00. (L.F. 131) The trial court then calculated interest at the rate of nine percent, which was the rate requested by Respondents and the rate the trial court found to be appropriate, on the $110,000.00 from May 8, 2002, which was the stipulated date of taking (assuming there was a taking), to the date of the Judgment. (L.F. 140, Appendix to Substitute Brief of Appellant, A-2) Such a calculation was supported by the evidence and was reasonable, not excessive.

H. Summary of Argument

There is only one issue properly before this Court for consideration, because Appellant has abandoned the remainder of its prior claims of error and has improperly attempted to alter the basis of its argument. The only question properly before this Court is whether Respondents were required to make a demand in accordance with § 408.040.2, RSMo., in order to recover pre-judgment interest. The clear answer to that question is no, so the award of pre-judgment interest to Respondents should stand.

Should this Court decide to review the remainder of Respondents' alleged claims of error, the Court will find those claims to be without merit. Under the

facts of this case, the constitutions of Missouri and the United States required that Respondents be awarded pre-judgment interest, so that Respondents could receive just compensation. The jury's verdict in no way prevented the trial court from awarding pre-judgment interest, particularly since the parties entered into a stipulation that the judge, not the jury, would decide the issue of pre-judgment interest. Finally, there is substantial evidence to support the trial court's award of pre-judgment interest and the amount of the award is not excessive.

CONCLUSION

Both the Circuit Court and the Court of Appeals correctly ruled that Respondents are entitled to pre-judgment interest in the sum of $25,791.12. Plaintiffs/Respondents Randolph and Kelly Akers respectfully request that this Court affirm the trial court's Judgment in all respects, that the costs of this appeal be taxed against Defendant/Appellant City of Oak Grove, Missouri and in favor of Respondents, and for such other and further relief as is just and proper.

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CERTIFICATE OF WORD PROCESSING PROGRAM

I HEREBY CERTIFY that this brief was prepared on a computer, using Microsoft Word. A computer diskette containing the full text of the brief is provided herewith, and it has been scanned for viruses and it is virus-free to the best of the undersigned's knowledge and belief.

Scott A. Hunter, Attorney for Respondents

RESPONDENTS' CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 84.06(c)

I HEREBY CERTIFY, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief is in compliance with the limitations set forth in Missouri Supreme Court Rule 84.06(b). According to the word count of the word processing system used to prepare this brief, the brief contains 10,450 words and has 1,111 lines.

Scott A. Hunter, Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of September, 2007, two true and accurate copies of the foregoing brief, and a computer diskette containing the full text of the brief, were deposited in the U.S. Mail, postage pre-paid, addressed to: James H. Ensz, Esq., Ensz & Jester, P.C., 2121 City Center Square, 1100 Main Street, Kansas City, Missouri 64105, *Attorneys for Appellant City Of Oak Grove, Missouri.*

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